



November 13, 2002

Ms. Leah Curtis Morris  
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OR2002-6496

Dear Ms. Morris:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 172129.

The Hunt County MHMR (the "HCMHMR"), which you represent, received a request for access to "invoices received by HCMHMR since January 2002 which contain any charge(s) for any form of legal service." You state that you have provided the requestor with some responsive information. You claim, however, that the remaining requested information is excepted from disclosure pursuant to sections 552.101, 552.103, and 552.107 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information.

Initially, we note that the information at issue is subject to section 552.022 of the Government Code. Section 552.022 provides that

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

...

(16) information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege[.]

Gov't Code § 552.022(a)(16). Thus, information contained in attorney fee bills must be released pursuant to section 552.022(a)(16) unless it is expressly confidential under other law. Although HCMHMR claims that portions of these fee bills are excepted from disclosure under sections 552.103 and 552.107(1) of the Government Code, we note that

these exceptions to disclosure are discretionary exceptions under the Public Information Act that protect the governmental body's interests and may be waived.<sup>1</sup> Accordingly, we conclude that HCMHMR may not withhold any portion of these fee bills under sections 552.103 or 552.107(1) of the Government Code. We note, however, that the Texas Supreme Court recently held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022." *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will determine whether any portions of these bills are confidential under rule 503 of the Texas Rules of Evidence.

Rule 503(b)(1) provides:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

- (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
- (B) between the lawyer and the lawyer's representative;
- (C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
- (D) between representatives of the client or between the client and a representative of the client; or

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<sup>1</sup> Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential), 473 (1987) (governmental body may waive section 552.111), 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions, therefore, do not constitute "other law" that makes information confidential.

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503. A communication is “confidential” if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *See id.* 503(a)(5).

Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.–Houston [14th Dist.] 1993, no writ). You state that portions of the fee bills at issue relate to the manner, method, and trial strategy being prepared to respond to certain litigation or anticipated litigation. Based on our review of your arguments and the information at issue, we agree that rule 503 is applicable to some of this information. Accordingly, we conclude that HCMHMR may withhold the information that we have marked pursuant to rule 503. However, we also conclude that HCMHMR has failed to sufficiently demonstrate how any portion of the remaining information at issue constitutes a confidential communication that is protected from disclosure under rule 503. Consequently, HCMHMR may not withhold any portion of the remaining information at issue pursuant to rule 503.

You also claim that portions of the fee bills at issue are confidential under rules 509 and 510 of the Texas Rules of Evidence. Rule 509 provides that confidential communications between a physician and patient as well as a physician’s records of the identity, diagnosis, evaluation, or treatment of a patient are privileged in a civil proceeding and protected from discovery. *See TEX. R. EVID. 509*. Similarly, rule 510 provides that confidential communications between a professional and a patient as well as a professional’s records of the identity, diagnosis, evaluation, or treatment of a patient are privileged in a civil proceeding and protected from discovery. *See TEX. R. EVID. 510*. By comparison, this office

has concluded that the protection afforded by section 159.002 of the Occupations Code relating to records that are subject to the Medical Practice Act ("MPA"), subtitle B of title 3 of the Occupations Code, extends only to records created by either a physician or someone under the supervision of a physician. *See* Occ. Code § 159.002; *see also* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). In addition, information that is subject to the MPA also includes information that was obtained from medical records. *See id.* § 159.002(a), (b), (c); *see also* Open Records Decision No. 598 (1991). After carefully reviewing your arguments and the fee bill information at issue, we find that no portion of this information was either created by a physician or professional or by someone under their supervision or was obtained from records that were created by a physician or professional or someone under their supervision. Accordingly, we conclude that HCMHMR may not withhold any portion of the information at issue under either rule 509 or rule 510 of the Texas Rules of Evidence.

You also claim that portions of the fee bills at issue are excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with federal regulations promulgated under the Health Insurance Portability and Accountability act of 1996 ("HIPAA").<sup>2</sup> You assert that certain health information contained within these fee bills is protected from disclosure by the privacy privileges established in the HIPAA regulations. *See* 45 C.F.R. Parts 160 *et seq.* These regulations include standards that protect a person's privacy in relation to certain individually identifiable health information. The regulations are applicable to health plans, health care clearinghouses, and certain health care providers. *See id.* Although HCMHMR claims that certain information in these fees bills is protected from disclosure under the HIPAA regulations, it does not specify a particular provision that prohibits the disclosure of the information at issue. Furthermore, we are not aware of such a HIPAA provision. Thus, after carefully reviewing your arguments and this information, we find that HCMHMR has failed to demonstrate how any portion of this information is protected from disclosure under the HIPAA regulations. Accordingly, we conclude that HCMHMR may not withhold any portion of this information under section 552.101 of the Government Code in conjunction with the federal regulations promulgated pursuant to HIPAA.

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<sup>2</sup> Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. *See* Gov't Code § 552.101. Section 552.101 encompasses information protected by other statutes and regulations.

In summary, HCMHMR may withhold the information that we have marked pursuant to rule 503 of the Texas Rules of Evidence. However, HCMHMR must release to the requestor the remaining submitted information that has not already been provided to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

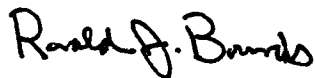
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Ronald J. Bounds  
Assistant Attorney General  
Open Records Division

RJB/lmt

Ref: ID# 172129

Enc. Marked documents

cc: Mr. Charles Galloway  
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Greenville, Texas 75402-5574  
(w/o enclosures)